Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

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No. 85-1225

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DONALD F. BAKER,

Petitioner,

v.

HENRY WADE, *et al.*,
and
DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 26, 1986

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QUESTIONS PRESENTED*

1. Whether Petitioner has standing to bring this action and whether a case or controversy exists that would give this Court jurisdiction over this matter?

2. Whether Hill, not the Attorney General, was the proper party to carry forward the appeal in this cause?

3. Whether the Fifth Circuit correctly held that this Court's summary affirmance in *Doe v. Commonwealth's Attorney* binds the lower courts in this case?

4. Whether the Fifth Circuit correctly analyzed Petitioner's equal protection claim in light of the legitimate and compelling state interests of morality, health and safety?

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* In accordance with S.Ct. Rules 22.1 and 34.1(b), Hill certifies that all parties to the Fifth Circuit judgment sought to be reviewed are: Donald F. Baker, Appellee, and Danny E. Hill, 47th District Attorney of Texas, in his official capacity as a member of the Defendant-Class, and as the Class Representative of the Defendant-Class, and the Defendant-Class, all of whom will hereinafter be referred to simply as "Hill", Appellants below. The State of Texas informally sought leave to intervene or appear as an *amicus curiae* after previously withdrawing the State's appeal, but formal action was never taken by the Fifth Circuit on the State's request. The Texas Attorney General has assumed that the State was an intervenor before the Fifth Circuit. Neither the State of Texas nor the Texas Attorney General was a legitimate party before the Fifth Circuit Court of Appeals.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinions below are discussed in Hill's Cross-Petition for Writ of Certiorari against the State of Texas, No. 85-1412, at 1-2 and Hill's Cross-Petition for Writ of Certiorari against Donald F. Baker, No. 85-1512, at 1-2.[1]

[1] There are two Petitions for Writ of Certiorari pending before the Court with respect to the Fifth Circuit's *en banc* decisions reported at 769 F.2d 289 and 774 F.2d 1285. Action No. 85-1251 was filed by the State of Texas against Danny E. Hill (hereinafter referred to as the "State Petition"). A similar and companion Petition for Writ of Certiorari was filed by the Plaintiff, Donald F. Baker, against Henry Wade, et al. and is referenced as No. 85-1225 (hereinafter referred to as "Baker Petition"). Hill filed a Cross-Petition against the State of Texas, No. 85-1412, and a separate Cross-Petition against Donald F. Baker, No. 85-1512. References to Hill's Cross-Petitions shall refer to the Court's docket numbers for the respective Petitions.

(Footnote continued on next page)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting *en banc*, was entered on August 26, 1985. A Petition for Rehearing *en banc* was denied on October 25, 1985. Baker invoked the jurisdiction of this Court under 28 U.S.C. §1254(1), but Hill denies that this Court has jurisdiction in two respects. First, as to Baker, he lacks standing to prosecute the present action (as explained fully below); consequently, this Court has no subject matter jurisdiction. Second, as to the State in No. 85-1251, it was at most an *amicus curiae* in the circuit court below, and an *amicus* cannot invoke jurisdiction of this Court under 28 U.S.C. §1254(1) (as detailed fully below). Moreover, the State has refused to take a position on the constitutionality of the state statute challenged in this case; thus, there is no Article III case or controversy in this cause and so no jurisdiction in this Court over either the State's or Baker's Petition. Accordingly, both Petitions should be denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions

Texas Constitution art. V, §21 is reproduced at Hill App. 11.

Texas Constitution art. XVI, §1 reads as follows:

> Members of the Legislature, and all other elected officials . . . shall take the following Oath or Affirmation: I, , do solemnly swear (or affirm), that I will faithfully execute the duties of the office . . . and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State . . . ."

(Footnote continued from previous page)

For the convenience of the Court and parties, references to the "Baker App." refer to the appendix to Petition for Writ of Certiorari in No. 85-1225, and references to the "Hill App." refer to the appendix to Cross-Petition for Writ of Certiorari in No. 85-1412. The Petitioner in No. 85-1251, the State of Texas, shall hereinafter be referred to simply as the "State." The Plaintiff and Appellee below who is the Petitioner in No. 85-1225, Donald F. Baker, shall hereinafter be referred to simply as "Baker."

B. Statutes

28 U.S.C. §2403(b) is reproduced at Hill App. 10.

Texas Penal Code §§21.01 and 21.06 are reproduced at Hill App. 8 and 9 respectively.

STATEMENT OF THE CASE

A full and complete statement of the case is included in Hill's Cross-Petitions, No. 85-1412 at 3-10 and No. 85-1512 at 2-9.

Baker has made the following misstatements of the facts of the case.

1. Baker's assertion that the district court conducted "further hearings" with respect to Hill's motion to intervene and be substituted as the class representative at the district court level (Baker Petition at 6 n.11, and 8 n.17) is erroneous. The district court denied Hill's motion to intervene and be named class representative without holding any hearings whatsoever on the motion. The district court's decision, which was released more than a year after the motions were filed and only a few weeks prior to the oral argument, was moot by the time the district court ruled because the Fifth Circuit had already granted Hill's motion to intervene and be substituted as the class representative on appeal.

2. Baker asserts that he did not seek injunctive relief against Hill or the defendant-class (Baker Petition at 4 n.4). This assertion is false. In Baker's pre-trial order, Baker sought "injunctive relief." (R. Vol. II at 338). The significance of Baker's failure to seek injunctive relief in his original complaint is that the defendant-class members were never given notice of Baker's request for injunctive relief since he did not seek such relief until after the class members were notified of the pendency of the suit. The defendant-class was never given notice of the contentions, issues and requests for relief in the pre-trial order prior to the entry of judgment.

3. Baker erroneously asserts that the Texas Attorney General "proceeded to defend Section 21.06 on the merits . . . while Wade and Holt represented, . . . a defendant class . . . ." (Baker's Petition at 4). Baker here implies that the Attorney General took an active role in defending the constitutionality of

§21.06. In fact, that assertion is false. The record clearly shows that the Attorney General did nothing more than file a four-page "response" on behalf of the State of Texas. He did not participate in the trial in an active manner and did not participate in the drafting and composition of the pre-trial order.

It is interesting that Baker admits in this section of his Petition that Wade and Holt were representing a clearly distinguishable party from the State. Baker admits that the defendant-class is a clearly distinct party from the State; however, throughout Baker's Petition he attempts to confuse the Court by stating that Hill is attempting to be substituted as the attorney for the State. Hill stands in the shoes of Wade and Holt, not the Attorney General or the State. Consequently, by Baker's own admission, Hill's substitution for Wade and Holt as the class representative clearly gives Hill standing to appeal. Baker reaffirms the distinction between the class representatives as a party and the State in Baker's Petition at 6 wherein he distinguishes the defendant-class representatives' decision not to appeal from the decision of Hill and the State to file notices of appeal.

4. Baker misleads the Court by implying that the post-judgment opinions of the district court with respect to Hill's motions to intervene and be substituted as class representative are final. (Baker's Petition at 7 n.15). The supplemental rulings of the district court are not final. A Notice of Appeal was filed by Hill with respect to the district court's erroneous decisions; however, due to the *en banc* court's decision that the failure to appeal was inadequate representation as a matter of law, it was not necessary for the Fifth Circuit to review and reverse the district court's opinions on the motions to intervene and be substituted.

5. Baker misleads the Court by implying that the *en banc* Fifth Circuit held that Hill had standing to represent the interests of the State. A fair reading of the Fifth Circuit's opinion shows that Hill was intervening as a member of the defendant-class sued by Baker and as the substituted class representative on appeal. Baker twists the words of the *en banc* court in order to mislead this Court into inferring that Hill purports to represent the interests of the State. He does not. He

represents his interests as a class member and the interests of the defendant-class chosen by Baker.

It is an interesting phenomenon of law when Baker can choose the defendant-class; choose the generals to lead the defendant-class; take a judgment including an injunction against the defendant-class; persuade the defendant-class representatives not to appeal; negotiate a settlement with co-counsel for one of the defendants (the State); leave the injunction against the individual defendant-class members intact; and, then argue that the defendant-class members and the substituted class representative on appeal do not have standing to appeal. This is the essence of Baker's position in his Petition. Do not the defendant-class members have a right to representation on appeal when they have been sued by Baker and involuntarily made parties to a federal court action? Do not the class members have a right to appeal when an adverse judgment is entered against them and their class representatives fail to appeal? Baker hopes that this Court will be misled by his shading, and sometimes blatant, misstatements of the facts. The only real question with respect to Hill's standing to appeal is whether a party that has been sued has a right to defend himself on appeal. Baker asserts that a party does not have a right to appeal. There are no unique legal issues presented by Baker's Petition. The uniqueness, if any, is the manner in which Baker continues to misstate the facts. Baker's confusion must not deter the Court from denying Baker's Petition because no true significant legal issues exist.

REASONS FOR DENYING THE WRIT

I.

BAKER HAS NO STANDING TO PROSECUTE THE PRESENT ACTION

Baker has neither alleged nor proven any actual injury which is sufficient to give him standing for purposes of prosecuting this suit. Hill has filed a Cross-Petition to this Court with respect to the Fifth Circuit's erroneous conclusion that Baker had standing to prosecute the present action. In the interests of brevity, Hill refers the Court to Section I of Hill's Cross-Petition, No. 85-1512 at 9—14.

This case is additionally distinguishable from *Hardwick v. Bowers,* 760 F.2d 1202 (11th Cir. 1985), *cert. granted sub nom. Bowers v. Hardwick,* 106 S. Ct. 342 (1985), No. 85-140, and *Dronenburg v. Zech,* 741 F.2d 1388 (D.C. Cir. 1984). In *Hardwick* the homosexual plaintiff was actually arrested, charged, and threatened with specific prosecution for particular acts he had committed. In *Dronenburg,* the Navy took direct action against the homosexual plaintiff. Thus, in both *Hardwick* and *Dronenburg* the homosexual plaintiffs were clearly affected by the statute and regulations which they challenged. Baker has no particular facts to bring to this Court with respect to his homosexual activities. Should the Court decide to grant Baker's Petition, Hill urges the Court to review and reverse the Fifth Circuit's holding that Baker had standing to prosecute the present action.

II.

HILL, NOT THE ATTORNEY GENERAL, WAS THE PROPER PARTY TO CARRY FORWARD THE APPEAL IN THIS CASE

A. This Issue Involves Merely a Matter of Texas Law Regarding Which State Officers May Represent Themselves in Federal Court And Is Not a Proper Subject for Supreme Court Review.

Baker (Baker Petition at 11) argues that the question of whether Hill or the Attorney General may carry forward the appeal in this case is a highly significant issue requiring this Court's attention. To the contrary, this issue involves merely a matter of Texas state law regarding which state officers may represent themselves in a federal forum. While Hill agrees that the Fifth Circuit determined this issue correctly in his favor, Hill suggests that this purely state-law issue is not a proper subject for Supreme Court review.

This Court has frequently held that a petitioner's challenge to state-law determinations made by a United States circuit court will rarely constitute an appropriate subject of Supreme Court review.[2] Recently, this Court announced that: "The

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2. *Haring v. Prosise,* 462 U.S. 306, 103 S. Ct. 2368, 2373 n.8 (1982). *See also Bishop v. Wood,* 426 U.S. 341, 346 (1976) (The Court normally accepts

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allocation of authority among state officers to represent the state before this Court is . . . wholly a matter of state concern." *New York v. Uplinger,* 467 U.S. 246, 104 S.Ct. 2332, 2333 n.1 (1984). This Court has also expressly declared that among the grounds for the Court to deny certiorari is the fact that the decision below may be supportable as a matter of state law. *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950). Texas law supports Hill's standing in the instant cause to carry forward his appeal, and Baker's challenge to this state law determination by the Fifth Circuit should not constitute an appropriate topic for this Court's consideration.

B. Hill And The Defendant-Class Of All City, County, And District Attorneys Are The True Defendants, Not The Attorney General Or The State.

1. Baker Sued Hill And The Defendant-Class, Not The State, The Attorney General Or The Governor.

Despite Baker's attempts to obfuscate the substance of this case (Baker Petition at 11—12), it was Baker who chose the defendants. He sued Hill and the defendant-class of all city, county, and district attorneys in Texas. He did not choose to sue the State, the Attorney General, or the Governor. Baker certified the defendants as a Rule 23(b)(2) class from which Hill could not opt out, and Baker obtained injunctive relief against the entire class, including Hill. Now, with the benefit of hindsight of seven years of litigation, Baker attempts to claim that he would have sued the State itself, but for the Eleventh Amendment. Baker further admits that he "could have sued the Texas Attorney General for declaratory relief" (Baker Petition at 12), but he neglected to do so allegedly because the Attorney General does not actively enforce Texas laws.

These excuses are simply inadequate, after-the-fact attempts to relieve Baker of his own choice of forum, defendants, and action. Baker chose to sue the specific class that he named, according to his counsel, James Barber, at *en banc* oral argument, so that he could obtain an injunction against all law enforcement attorneys in the State to prohibit them from enforcing §21.06. Such a decision represents a considered, studied choice, not an oversight on the part of Baker or his

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any reasonable construction of state law by the Court of Appeals, even if a separate examination of state law might justify a different conclusion).

counsel.[3] If Baker had wanted the Texas Attorney General to be the sole representative for the defendant-class, Baker should have sued the Attorney General. Baker chose his opposition to be the defendant-class, but now he wants a party that he did not sue to be the exclusive spokesman for the defendants. In essence, Baker is looking to this Court to extricate him from the predicament of federal class-action jurisprudence into which he has purposely gotten himself. This Court should decline Baker's invitation.

2. Baker Has Waived Any Objection To Hill's Standing And Any Argument That The State Or The Attorney General is the True Party in Interest.

Baker's claim that the State is "the real party in interest in this case" (Baker Petition at 11) confuses the concepts of "real party in interest" and "capacity to be sued." In addition, Baker has waived any right to make this claim and so challenge the capacity of Hill as a true defendant under Federal Rules of Civil Procedure 9 and 17. The authorities on this issue have been explained fully in Section II.E of the argument in Hill's Cross-Petition against Baker (No. 85-1512), and for brevity's sake, the Court is respectfully referred to that section. Baker is now estopped to raise any such challenge against Hill.

3. If Hill Can Be A True Party For 42 U.S.C. §1988 Purposes, Hill Is The True Party Defendent As Well.

Contrary to Baker's present protestations regarding potential attorneys fees being awarded against the State in this cause (Baker Petition at 14), Baker's counsel, James Barber, in answer to a specific question from the *en banc* panel at the Fifth Circuit oral argument, admitted and affirmed that he and his client would seek their attorneys fees in this case against Hill and his jurisdiction, Potter and Armstrong Counties, not against

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3. Other homosexuals challenging other states' sodomy statutes appear to have decided to use other procedural methods to sue. For example, in *Ward, et al. v. Connick, et al.*, Civil Action No. CA 84-5735-§C (E.D. La.), a case filed on December 3, 1984, in the federal district court in New Orleans, Louisiana, the homosexual plaintiffs challenging the Louisiana sodomy statutes have named as defendants only the Louisiana Attorney General, William J. Guste, Jr., the Louisiana Governor, and the New Orleans District Attorney.

the State.[4] Furthermore, the district judge in this case has already indicated in no uncertain terms that if Hill does not prevail in this appeal, the district court will award Baker's attorneys fees against Hill and Potter County, not against the State. *Baker v. Wade,* 106 F.R.D. 526 (N.D. Tex. 1985) (Baker App. at 112a n.33). Thus, if Hill can be the true "non-prevailing party" for §1988 attorneys fees purposes by Baker's and his counsel's own admission and by statements of the trial judge, then Hill should certainly be the true party defendant and appellant for purposes of this appeal.

Baker's authorities that Hill is not the true defendant are miscited. For example, *Brandon v. Holt,* 105 S.Ct. 873 (1985), properly read, indicates that a suit against a governmental official in his official capacity represents, in actuality, a suit against the jurisdiction of the government that the official represents. The analogy to *Brandon* in the instant case would most properly mean that Baker's suit against the district attorneys of Texas is, in effect, a suit against the specific counties that they represent in their jurisdictions, not against the State as a whole, since, as Baker has argued elsewhere in his Petition (Baker Petition at 11—12, 18—20), the district attorneys represent only their own counties, not the entire State. Consequently, Baker's cited cases do not apply to the instant issue regarding what parties are the true defendants in this case, except to reinforce Hill's position.

C. Baker's Reliance Upon The "True Motives" Of The Texas Attorney General Is Misplaced.

Throughout Baker's Petition, he places great reliance on the Attorney General's assessment of the interests served in dismissing the appeal. Baker argues extensively that the Attorney General's decision to dismiss the appeal was based on economic factors and the potential costs associated with recovery of Baker's attorneys fees against the State. Baker's asser-

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[4] Mr. Barber also admitted, in response to a direct question from Judge Jones at *en banc* oral argument, that he and his client had entered into a settlement with the Attorney General which would reduce their earlier fee award from the district court in return for the State dropping its then-pending appeal to the Fifth Circuit. Thus, Baker's allegation at page 14 of the Baker Petition that Texas has already been assessed more than $80,000 in costs and fees is no longer correct; the settled fee is less and cannot increase.

tions of "governmental reasons not to appeal an adverse decision" are mere conjecture and an attempt to direct the Court's attention away from the Attorney General's true motives in withdrawing the State's appeal. Nothing in the record indicates that the Attorney General was concerned with potential attorneys fees assessed against the State. In fact, the State has been taxed and has already paid Baker's counsel's legal fees.[5]

The Fifth Circuit clearly rejected Baker's arguments concerning "governmental reasons not to appeal" the judgment. The court was concerned with the adequacy of representation and not with the personal decisions of the Attorney General not to appeal. The court correctly determined that "where the district court has rejected binding Supreme Court authority, the circuit court is entitled to conclude as a matter of law that those interests are inadequately represented by those who fail to pursue the appeal. . . ."[6] On the basis of the record, the decision of the Texas Attorney General, Jim Mattox, not to appeal cannot be supported for any reason other than Mr. Mattox' personal bias and opinions favoring the repeal of laws prohibiting homosexual conduct.

Baker's reliance on the Attorney General's participation in the trial and unbiased decision regarding appeal is without merit. With the exception of filing a four-page "Response," the Attorney General did absolutely nothing at trial to defend the constitutionality of §21.06. The Attorney General did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; and, did not participate in trial strategy for the defendant-class. In fact, the Record indicates that although the City and District attorneys for Dallas offered evidence at trial and examined witnesses, the Attorney General was silent. (R. Vol. VII, 1-283 (Transcript of Proceedings)).

Baker's assertions of objective reasoning and analysis by the Attorney General are absurd. Texas Governor Mark White, who was Attorney General at the time of filing the Notice of

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5. Baker asserts in the Baker Petition that the State "will obviously be liable for . . . future awards under Section 1988." Baker Petition at 14. If, as Baker concludes, the State is going to be liable for future awards under §1988, then it would seem appropriate for the State to assist Hill in prevailing in the present action rather than assisting the State's purported adversary, Mr. Baker.

6. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*).

Appeal by the State (November 1, 1982), determined that it was appropriate that an appeal be taken on behalf of the State. After the November 1982 election, Jim Mattox became Attorney General. Mr. Mattox' interest in §21.06 dates back to 1975 when he was a member of the Texas House of Representatives. On May 28, 1975, in the waning hours of the legislative session, Mr. Mattox attempted to repeal §21.06 by inserting it obscurely in a lengthy committee amendment to a similar Senate bill. The hidden reference was discovered, and by a vote of 117 YAYS and 14 NAYS, the reference to §21.06 was removed from the amendment. The Vote was a reaffirmation of §21.06 as the law of Texas. Mr. Mattox' personal attempt to repeal §21.06 failed.

On March 9, 1983, without reason or explanation, Mr. Mattox announced to the Fifth Circuit that the State would not prosecute this appeal (Hill App. 2). On March 19, 1983, Mr. Mattox filed a Motion to Withdraw the State's appeal (Hill App. 3). There is absolutely no support in the record for Baker's conclusion that Mr. Mattox' decision to withdraw the State's appeal was based upon anything other than Mr. Mattox' personal or political bias. Baker's unsupported presumption of "the interests of the State" being best served is clearly refuted by the meritorious grounds for appeal which the *en banc* Fifth Circuit determined constituted inadequate representation as a matter of law.[7]

Irrespective of the legal merits of A & M's appeal, the refusal of the Attorney General to allow A & M to retain outside counsel; the Attorney General's refusal to turn over the legal file to the University's outside counsel; and, the Attorney General's employment of an attorney directly opposing an institution of the State which he is charged to defend and

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[7] *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*). Jim Mattox' personal bias against laws regulating homosexual conduct is further evidenced by his actions with respect to the Attorney General's representation of Texas A & M University in *Gay Student Services. Gay Student Services v. Texas A & M University,* 737 F.2d 1317 (5th Cir. 1984). (The case involved the question of whether a homosexual organization had a right to be recognized on the Texas A & M University campus. The Fifth Circuit determined that Gay Student Services did have a constitutional right to recognition and that the University's failure to recognize the group was a violation of the United States Constitution.)

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permitting such attorney to continue to represent clients opposed to those interests, shows Mr. Mattox's callous indifference to the interests and rights of the parties he is charged to represent with respect to the homosexual issue. Baker's heavy reliance upon the impartiality of the Texas Attorney General with respect to homosexual sodomy is misplaced. It is unclear whether Mr. Mattox' decision not to appeal is based upon a "governmental reason" or upon his personal or political bias in support of homosexual conduct. Nevertheless, a substantial question exists as to the true reasons why Mr. Mattox withdrew the State's appeal and is now fighting so vigorously to deny Hill and the defendant-class their right to appellate review of the judgment against them. This is not a matter which this Court should undertake to review by means of Baker's Petition.

D. Correct Role of State Attorneys General Under 28 U.S.C. §2403(b) And This Court's Decisions.

1. Section 2403(b) Intervention.

a. A State Officer Or Employee Was Already A Party.

b. The State May Intervene Only To Support The Constitutionality Of The Statute.

Baker argues (Baker Petition at 17) that Congress, through 28 U.S.C. §2403(b), "has long recognized the primacy of state attorneys general in directing litigation challenging the constitutionality of state law." Baker's reliance on §2403(b) in this

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(Footnote continued from previous page)

On October 3, 1984, the Fifth Circuit rendered its decision in *Gay Student Services.* After the Court's decision, the Attorney General repeatedly refused to appeal the decision despite the request of the A & M Board of Regents. Mr. Mattox also informed A & M that they could not seek outside counsel with respect to the appeal because he was the University's sole legal representative. Regardless of Mr. Mattox' statements, the University employed other counsel to represent A & M on appeal. Despite this action, Mr. Mattox continually refused to recognize A & M's new counsel, and refused repeated requests from A & M to forward the legal file to the new attorney of record for the University. Eighty-four days after entry of Judgment by the Fifth Circuit, the Attorney General realized his error and turned over the file.

J. Patrick Wiseman acted as lead counsel for Gay Student Services in its suit against Texas A & M. On October 1, 1984, Mr. Wiseman joined the Attorney General's office as Chief of the State and County Affairs Division. After joining the Attorney General's office, Mr. Wiseman continued to represent Gay Student Services with respect to the appeal to this Court. On or about December 26, 1984, J. Patrick Wiseman, as counsel for Gay Student Services, filed Appellee's Motion to Dismiss or Affirm in this Court.

case is sadly misplaced, because proper application of §2403(b) would preclude the Texas Attorney General from participating in this case at all.

The facial provisions of §2403(b) and the case law interpreting this statute declare that an attorney general may not intervene in a suit regarding a state statute's constitutionality if an officer or employee of the state is already a party and that, if allowed, a state may intervene only to *support* the constitutionality of the challenged statute. In the instant case, both at the trial level and at the appellate level, when the Attorney General attempted to intervene, State officers and employees were already party defendants to the cause. Moreover, the Attorney General has scrupulously avoided taking a position in this case on the constitutionality of §21.06; indeed, all of his efforts to have this appeal dismissed would act to defeat the statute, not support its constitutionality. The complete argument and authorities for these propositions have been supplied in Section II.D of the argument in Hill's Cross-Petition against Baker (No. 85-1512), and for the sake of brevity the Court is respectfully referred to those arguments and authorities.

2. If The Attorney General Refuses To Take A Stand On The Statute's Constitutionality, There Is No Article III Case Or Controversy And No Jurisdiction In This Court.

The Attorney General has repeatedly disavowed, both explicitly and implicitly, any intention to address or support the constitutionality of §21.06 in this case.[8] Moreover, the State's brief to the Fifth Circuit *en banc,* at 11, specifically admits that the State sought intervention on appeal only "to defend his [the Attorney General's] exclusive right to represent the State's interests before this Court." The brief itself studiously avoided addressing the constitutionality of §21.06, even though the Fifth

[8] For example, in response to the Attorney General's February 20, 1985 letter to the Fifth Circuit requesting intervention at the *en banc* stage (Hill App. 5), Hill's counsel telephoned the Attorney General, who admitted that he sought to intervene only to address the issue of Hill carrying forward the appeal and that he would not address the constitutionality of §21.06. *See* February 25, 1985 letter of Hill's counsel to Fifth Circuit (Hill App. 7).

Circuit's March 4, 1985 Order explicitly invited the Attorney General to brief that issue.[9]

In a similar case, this Court held that it had no jurisdiction and dismissed the suit for lack of any Article III case or controversy. *Princeton University and New Jersey v. Schmid,* 455 U.S. 100 (1982).[10] Precisely the same conclusion should be reached in this action. This cause should be dismissed and the Petitions denied, even though Baker himself may still be interested in the case, because the Texas Attorney General has failed and refused to assert a position on §21.06's constitutionality.

E. The Attorney General Is Not The Spokesman For The Defendants In This Case.

Once again, Baker attempts to mislead this Court in his argument that the Attorney General is the designated legal spokesman for Texas (Baker Petition at 18-19) since the truth *vel non* of this statement is irrelevant to the instant cause. The pertinent question herein is whether the Attorney General is the legal spokesman for Hill and defendant-class in this suit. Unequivocally, the Attorney General is *not* the spokesman for such defendants in this cause. In fact, Texas law itself clearly authorizes Hill to carry forward this appeal.

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9. The State's Petition to this Court (No. 85-1251) also fails to address the issue of the constitutionality of §21.06.

10. In *Princeton,* an individual was convicted of criminal trespass upon Princeton University's property in New Jersey, and the defendant appealed through the New Jersey courts. At the New Jersey Supreme Court level, Princeton University intervened as a party, and after that court reversed the lower court's judgment, both the State of New Jersey and Princeton University filed a joint notice of appeal and jurisdictional statement to this Court. The New Jersey Supreme Court had found the state criminal trespass statute unconstitutional, but in the State's brief to the United States Supreme Court, the New Jersey Attorney General deemed "it neither necessary nor appropriate to express an opinion on the merits" of the constitutionality of the statute. 455 U.S. at 101. In a *per curiam* opinion expressing the unanimous view of the eight participating Justices, this Court found that since the state "declined to take a position on the merits," there could be no case or controversy and: "We do not sit to decide hypothetical issues or to give advisory opinions." 455 U.S. at 102. The Court thus dismissed the appeal, even though the other party appellant, Princeton University, wanted to continue the appeal.

1. The Fifth Circuit Correctly Determined That Texas Law Authorizes Hill To Pursue The Appeal And That The Attorney General Has No Authority To Represent The Defendant Class And Its Memebers.

The agruments and authorities supporting this position have been briefed by Hill in his Brief in Opposition to the State's Petition. In the interests of brevity, the Court's attention is directed to Section III of Hill's Brief in Opposition to the State's Petition.

2. Under Texas Law, The Attorney General May Issue Formal Legal Opinions, But Such Opinions Do Not Bind Other State Agencies, Officers, Or Courts, Who May Assert Positions Contrary To The Attorney General.

State law demonstrates that the Attorney General is not all powerful and cannot bind other State agencies, officers, or courts with his opinions. Hill has provided a complete explanation with authorities for this proposition in his Brief in Opposition to the State's Petition at Section IV.C, and the Court is respectfully referred to that discussion in the interest of brevity herein.

F. Conclusion: Principles Of Comity And Federalism Support The Decision Of The Fifth Circuit.

The true principles underlying federal-state comity require that this Court allow the Texas Legislature, not the histrionics of a single state official (the Attorney General) nor the personal beliefs of a single federal trial judge, to determine the validity and continued vitality of §21.06. The Texas Legislature has consistently refused to repeal §21.06 at the behest of homosexual activists in Texas, *Baker v. Wade,* 553 F. Supp. 1121, 1151 (N.D. Tex. 1982), thus indicating that the will of the people of Texas is to maintain §21.06 as a viable state statute. Indeed, as Judge Reavley has cautioned: "Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people." 774 F.2d at 1286. This Court should not disturb the announced will of the people of Texas represented by the continued retention of §21.06.

III.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT *DOE V. COMMONWEALTH'S ATTORNEY* WAS BINDING ON LOWER COURTS AND THAT THERE IS NO CONSTITUTIONAL RIGHT OF PRIVACY TO ENGAGE IN PRIVATE CONSENSUAL HOMOSEXUAL CONDUCT

A. *Doe* Is Binding.

Baker's extreme criticism of the Fifth Circuit's judicial restraint with respect to this Court's binding authority in *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976), is unwarranted. Of the sixteen *en banc* judges that considered Baker's arguments, only one, Judge Goldberg, saw fit to write a dissenting opinion with respect to the court's holding that it was bound by *Doe.* Although seven judges dissented with respect to Hill's standing, none of the other six dissenters joined Judge Goldberg in his brief dissent on the merits.

Most courts have consistently followed the binding precedent in *Doe;* however, there are some exceptions, most notably, the majority in *Hardwick v. Bowers* and the district court in *Baker v. Wade.* These three judges erroneously felt that they were free to insert their own opinion as to the constitutional right of privacy rather than following this Court's precedent in *Doe.* The analysis of these jurists was expressly rejected by the nine members of the *Baker en banc* majority and, through implication, by six of the dissenters. In addition, the District of Columbia Circuit has firmly followed *Doe. Dronenburg v. Zech,* 741 F.2d 1388 (D.C. Cir. 1984). This Court should not grant Baker's Petition on this basis since *Hardwick v. Bowers* will dispose of the issue. The Fifth Circuit's treatment of *Doe* does not depart from established judicial standards. The court applied the correct legal analysis with respect to summary affirmances by this Court.

It is interesting that Baker relies upon Justice Rehnquist's concurring opinion in *Pressler v. Blumenthal,* 434 U.S. 1028 (1978), to demonstrate the Fifth Circuit's error in relying upon the binding precedent of *Doe.* Footnotes 5 and 17 of *Carey v. Population Services Int'l,* 431 U.S. 678, 688 n.5, and 694 n.17 (1977), formed the basis of Baker's argument that *Doe* was no

longer controlling. However, in *Carey* Justice Rehnquist noted in his dissent that the outer limits of the right of privacy had been reached with respect to homosexual conduct. As an example, Justice Rehnquist cited *Doe* and *Hicks v. Miranda,* 422 U.S. 332 (1975). *See Carey v. Population Services Int'l.,* 431 U.S. 678, 718 n.2 (1977) (J. Rehnquist, dissenting). Consequently, the Fifth Circuit's treatment of *Doe* does not depart from established legal standards. The Fifth Circuit correctly analyzed the procedural requirements of summary affirmances such as *Doe* and then applied the substantive judgment of *Doe* to the instant case.

B. No Right Of Privacy To Homosexual Conduct.

The *en banc* Fifth Circuit correctly determined that there is no constitutional right of privacy to engage in homosexual conduct. The Fifth Circuit followed this Court's summary affirmance in *Doe v. Commonwealth's Attorney* for the reasons stated by the District of Columbia Circuit in *Dronenburg v. Zech,* 741 F.2d 1388, 391-92 (D.C. Cir. 1984), and by Judge Kravitch in her dissent in *Hardwick v. Bowers,* 760 F.2d 1202, 1213-16 (11th Cir. 1985), *cert. granted sub nom. Bowers v. Hardwick,* 106 S. Ct. 342 (1985). Baker's Petition avoids the right of privacy argument because this Court will have an opportunity to determine that issue in *Bowers v. Hardwick,* No. 85-140.

With the exception of the district court below and two judges of the Eleventh Circuit in *Hardwick,* all other federal courts that have reviewed the right of privacy in the context of homosexual conduct have determined that homosexual conduct is not protected by the Constitution and that laws proscribing such conduct need not be reviewed with heightened scrutiny. In *Dronenburg,* Judge Bork analyzed *Griswold v. Connecticut,* 381 U.S. 479 (1965), *Eisenstadt v. Baird,* 405 U.S. 430 (1972), *Roe v. Wade,* 410 U.S. 113 (1973), and *Carey v. Population Services Int'l,* 431 U.S. at 694 (1977), and concluded that "we do not find any principal articulated *even approaching* in breadth that which the homosexual appellant seeks us to adopt." 741 F.2d at 1395-96 (emphasis added). Finally, Judge Bork concluded that "we can find no constitutional right to engage in homosexual conduct and . . . as judges, we have no

warrant to create one." 741 F.2d at 1397. This Court has consistently limited the right of privacy to such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This Court has never held that homosexual conduct is constitutionally protected. This Court's summary affirmance in *Doe* holds that it is not protected conduct. *Hardwick* will give this Court the opportunity to again reject the claims of homosexuals that their conduct is entitled to constitutional protection and that laws proscribing such conduct should be subject to heightened scrutiny. Therefore, Baker's Petition with respect to this issue should be denied.

IV.

THE FIFTH CIRCUIT CORRECTLY ANALYZED PETITIONER'S EQUAL PROTECTION CLAIM

Initially, this Court should note Baker's mischaracterization of the Fifth Circuit's opinions below regarding his equal protection claim. Contrary to Baker's assertion that the Fifth Circuit disposed of the equal protection argument "in a single, short paragraph" (Baker Petition at 23), Judge Reavley actually devoted considerable time to this argument in the Fifth Circuit's supplemental opinion on Baker's petition for rehearing *en banc*. Judge Reavley held that §21.06 was directed at certain *conduct,* not at a class of people, and that the statute affects only those who choose to act in the manner proscribed. 774 F.2d at 1287.

Baker also misstates the true nature of §21.06 in claiming that the law would ban consenting, adult sexual intimacy only in the confines of the home (Baker Petition at 24). In point of fact, the statute is facially silent regarding whether it applies in public as well as in private, and the Texas courts have held that the sodomy statute applies both in public and in private. *See Torme v. State,* 525 S.W.2d 9 (Tex. Crim. App. 1975); *Pruett v. State,* 463 S.W.2d 191 (Tex. Crim. App. 1970), *appeal dism'd,* 402 U.S. 902 (1970); *Bishoff v. State,* 531 S.W.2d 346 (Tex. Crim. App. 1976). The *en banc* Fifth Circuit also recognized this factor in its initial opinion in this case when it found: "Insofar as §21.0[6] condemns public homosexual conduct, it

overlaps Tex. Pen. Code Ann. §21.07 (Vernon 1974), which proscribes, among other sexual acts, deviate sexual intercourse in public places." 769 F.2d at 289 n.1.[11]

Moreover, Baker's own trial testimony and the trial judge's opinion both belie Baker's alleged concern about his right to privacy solely in his own home. Baker admitted at trial that he had never been arrested or even threatened with arrest for engaging in the prohibited conduct in the privacy of his own home. (R. Vol. VII at 155, 184). Moreover, as the trial court noted, Baker admitted that he traveled widely and could be subject to prosecution under §21.06 outside his hometown of Dallas. 553 F. Supp. at 1128 n.11. Thus, unless Baker carries his home on his back, he obviously contemplates indulging in the prohibited conduct outside of his own home and is estopped to claim before this Court that he is concerned about §21.06 solely with respect to his own home.

A. Baker's "Intimacies In The Home" Argument is Misplaced.

Baker's continual plea regarding "intimate behavior in the solitude of a private home" (Baker Petition at 24) is an attempt to divert this Court's attention away from the true nature of this case and the historical use of §21.06. As mentioned, Baker testified at trial that he had never been arrested or even threatened with arrest for engaging in homosexual sodomy in the privacy of his own home. Moreover, the uncontroverted trial testimony manifested that §21.06 has *never* been used in a

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11. Baker's counsel at trial recognized this potential public application cation of §21.06 through his in-depth questioning of Captain Milliken of the Dallas Police Department, Vice Division, regarding whether §21.06 and §21.07 could be applied to arrest homosexual offenders in a specific "gay bath" in Dallas that was raided by Vice Squad officers during the pendency of the case below. (R. Vol. VII at 272—74). For the Court's information, a "gay bath" is a euphemism for a large building catering exclusively to homosexuals where, at any given peak occupancy, numerous homosexual men may be inside engaging with each other in deviate, group sexual exploits. *See Harris v. United States,* 315 A.2d 569 (D.C. App. 1974) (*en banc*) (such a "homosexual health club" where regular group acts of sodomy took place held nothing more than a bawdy house and ruled a "nuisance per se"); *United States v. McKean,* 338 A.2d 439 (D.C. App. 1975) (same "health club's" cubicles used regularly for homosexual sodomitic acts); M. HUNT, GAY: WHAT YOU SHOULD KNOW ABOUT HOMOSEXUALITY 153 (1977) (gay bath patron commonly has "a dozen or more partners in a night").

private residence situation but has been invoked in numerous circumstances involving public or presumably public activity. (R. Vol. VII at 257-58, 265-66, 270-71, 272-74).

Baker further cites *Stanley v. Georgia,* 394 U.S. 557 (1969), to bolster his "privacy of the home" argument, but the Court must recognize that the instant suit is not a Fourth Amendment case involving any actual warrantless arrest of Baker in his home. In fact, the Fourth Amendment requirement of a search warrant or probable cause to invade a private residence provides sufficient protection for Baker's actual sex-in-the-home situation. With regard to all of the public and quasi-public circumstances in which the testimony revealed §21.06 to be enforced, *Stanley* has no application whatsoever. *See United States v. Reidel,* 402 U.S. 351, 354 (1971) (*Stanley* limited solely to the home situation).

Finally, Baker's hyperbolic "sanctity of the home" argument would sanction any type of conduct so long as it took place solely within the confines of a private residence and would lead to the conclusion that states may pass no laws against such activities as fornication, adultery, polygamy, incest, necrophilia, beastiality, and the like which may, but do not necessarily, occur in private. This Court's opinions and the decisions of numerous federal circuit courts reject this ultimate "privacy" argument in exactly these types of situations. *See Zablocki v. Redhail,* 334 U.S. 374, 399 (1978) (Powell, J., concurring — incest, bigamy, and homosexual conduct); *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985) (polygamy); *Shawgo v. Spradlin,* 701 F.2d 470 (5th Cir. 1983) (fornication); *Reynolds v. United States,* 98 U.S. 145 (1878) (polygamy). Surely this Court should not accept Baker's invitation to legitimize these types of sexual perversions through the oblation of the asserted "sanctity of the home" argument.

B. Baker's Gender-Classification Argument Is Invalid.

The Fifth Circuit, as well as the trial court below, correctly determined that homosexuals do not constitute a suspect or quasi-suspect class and, consequently, that laws proscribing homosexual conduct are not subject to strict scrutiny. The standard of review is whether such laws are rationally related to a legitimate state end. The claims of homosexuals that they constitute a suspect or quasi-suspect class have been rejected by

virtually every court that has reviewed them. Section 21.06 is neutral on its face and does not create classifications of people. The statute forbids conduct, not status. All persons, whether male or female; black, brown, or white; young or old; married or unmarried; employed or unemployed; rich or poor; or, of any religion or national origin, are forbidden from engaging in the carefully defined conduct. The statute applies to all and does not discriminate as to any group or sect of persons. Equal protection analysis is inapplicable in this situation.

Baker attempts to postulate a new quasi-suspect classification based upon "gender." Baker's gender postulate is nothing more than a new disguised suspect classification in which Baker hopes the Court will create a higher level of scrutiny with respect to instances of homosexual conduct or activity. Even the district court, in its erroneous conclusions and results throughout its memorandum opinion, did not go so far as to find that homosexuals constitute a suspect class such that a higher level of scrutiny is necessary. This Court should not venture into Baker's gender classification trap.

Baker offers the Court no authority for his gender-classification equal protection argument. The primary case cited by Baker, *Loving v. Virginia,* 388 U.S. 1 (1967), involved the *race* of the participants, not their *gender.* The leap from race to gender is too wide a gap to bridge in order to make §21.06 scrutiny an issue this Court should review. Gender classifications only apply, if at all, when one gender is given the opportunity or right to participate in conduct that is proscribed against the other gender. Section 21.06 applies equally to all genders. Baker's gender classification arguments are irrelevant and unsupported by any case law. Section 21.06 does not discriminate on the basis of a person's gender. It proscribes conduct, not gender. Baker's gender hypothesis is an irrelevant point which is unsubstantiated in law or reason.

C. The Fifth Circuit Properly Applied The Appropriate Level of Scrutiny.

Since, as demonstrated above, no suspect classification is at issue, equal protection analysis requires only a rational relationship to a legitimate state interest to sustain §21.06. *San Antonio School District v. Rodriquez,* 411 U.S. 1, 40 (1973). The

Fifth Circuit found morality to be such a legitimate state interest.

1. Morality Is A Legitimate State Interest, And Homosexual Sodomy Is Per Se Immoral And Indecent.

The federal and state authorities holding that morality and decency represent compelling state interests and that homosexual sodomy is per se immoral and indecent have been set forth fully in Hill's Cross-Petition against Baker (No. 85-1512), at Section IV.A, and the Court is respectfully referred to that Cross-Petition.

Baker's complaint (Baker Petition at 28) that the Fifth Circuit ignored the trial judge's findings concerning no evidence of a moral basis for 21.06 has been adequately answered by Judge Reavley in the Fifth Circuit's supplemental opinion on petition for rehearing *en banc* wherein he correctly notes that such a finding involves legislative as opposed to adjudicative facts. 774 F.2d at 1287. The distinction between legislative and adjudicative facts has been adequately explained in Section V of the argument in Hill's Cross-Petition against Baker, and Judge Reavley correctly held that the appellate court was not bound by any legislative fact finding of the trial judge.

Thus, the Fifth Circuit was free to find that homosexual sodomy is immoral and that §21.06 is rationally related to implementing the State's correct concept of morality in this regard.

2. The Fifth Circuit's Opinion Should Be Sustained On The Legitimate And Compelling Grounds Of Health And Safety.

The evidence concerning the dangers posed by homosexual conduct to the health and safety of the State's citizens is substantial. The material regarding the transmission of AIDS and other serious sexually transmitted diseases through the medium of the precise homosexual sodomitic acts proscribed by §21.06 has been summarized in Section IV.B of Hill's argument in his Cross-Petition against Baker (No. 85-1512). The Fifth Circuit's reliance on this evidence should be sustained.

Medical evidence indicating threats to the health of the public as a result of homosexual oral and anal sodomy grows daily. A recent controlled medical study of 30 monogamously

paired homosexual males, most of whom routinely practiced anal and oral sodomy, strongly supported the "hypothesis that allogeneic sperm is an etiologic factor in the pathogenesis of acquired immune dysregulation among homosexual males." The reason identified for this correlation, homosexual "anal-genital intercourse," was distinguished from the normal hetero-sexual genital-vaginal intercourse because of "the critical structural difference between the rectum and the vagina. While the lining of the vaginal mucosa comprises a squamous multilayer epithelium capable of protecting against any abrasive effect during intercourse, the interlining of the rectum is made of a single layer of columnar epithelium . . . incapable of protecting against any abrasive effect." Mavligit, et al., *Chronic Immune Stimulation By Sperm Alloantigens: Support For The Hypothesis That Spermatozoa Induce Immune Dysregulation In Homosexual Males,* 251 J. AM. MED. A. 237-41 (1984). Thus, the health dangers associated with homosexual oral and anal sodomitic acts — precisely those proscribed by §21.06. — occur as a direct result of such conduct.

Even more alarming, however, is another recent medical study of a homosexual "Patient O," who admitted having had 250 different male sexual partners each year from 1979 through 1981, a total of 750 different partners. This Patient O traveled throughout the United States during that three-year period, and investigating doctors identified Patient O as the carrier and common link among 40 separately infected AIDS patients from Los Angeles to New York City. The investigating physicians correctly concluded that this extreme example of disease-passing by one homosexual carrier reinforces the medical findings "regarding the importance of sexual activities in the development of AIDS among homosexual men." Auerbach, et al., *Cluster Of Cases Of The Acquired Immune Deficiency Syndrome: Patients Linked By Sexual Contact,* 76 AM. J. MED. 487-91 (1984).

Finally, on March 13, 1986, another medical study was reported in which public officials across the country are noting with concern a marked increased in tuberculosis infections among AIDS patients, frequently in the largest identified risk-group, homosexual and bisexual men. As the report summarizes, the cause for concern is great: "The TB bacillus, however,

is a highly infectious microbe that can infect even the healthiest person and it can be easily spread by coughs and sneezes."[12]

In the face of such compelling medical evidence regarding the dangers to the homosexual participants and the public, it simply cannot be claimed that §21.06 is not rationally related to the legitimate and compelling state interests of public health and safety. Consequently, Baker's arguments to the contrary fail, as the Fifth Circuit correctly concluded.

CONCLUSION

The case at bar, with its unusual named defendant class of all state district, county, and city attorneys, with the State Attorney General dropping an appeal and later attempting to reintervene in the same appeal, and with the original named class representatives failing to timely appeal but a class member filing his own timely notice of appeal, is so procedurally unique that, in all probability, such a case will never recur. As discussed above, Baker's counsel admitted at *en banc* oral argument that he would never structure a case in this fashion again, and new homosexual challenges to state sodomy statutes (such as that of Louisiana) have declined to adopt this defendant-class tactic. Therefore, since this case is not likely to recur and involves solely the unique claims of the instant parties, this cause does not provide an appropriate vehicle for the Supreme Court to exercise its discretionary certiorari jurisdiction and thus exhaust the valuable time of this Court.

Moreover, as described above, there is no real conflict between *Hardwick* and the case at bar since *Hardwick* was not a decision on the merits regarding the constitutionality of the

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12. *Tuberculosis Rise Among AIDS Patients Raises Concern About Wider TB Infection,* Wall Street Journal, March 13, 1986, at 25. Other medical reports frequently identify the additional risk of acquiring AIDS through blood transfusions. *E.g.,* Peterman, et al., *Transfusion-Associated Acquired Immunodeficiency Syndrome In The United States,* 254 J. AM. MED. A. 2913 (1985). And, of course, the evidence identifying homosexual anal and oral sodomy as prime vectors in the transmission of AIDS continues to mount. *E.g.,* Jaffe, et al., *The Acquired Immunodeficiency Syndrome In Gay Men,* 103 ANNALS INTERN. MED. 662 (1985); Levine, et al., *Retrovirus And Malignant Lymphoma In Homosexual Men,* 254 J. AM. MED. A. 1921 (1985); McKusick, et al., *The AIDS Epidemic: A Model For Developing Intervention Strategies For Reducing High-Risk Behavior In Gay Men,* 12 SEX. TRANSM. DIS. 229 (1985).

Georgia statute, but only a Rule 12(b) pretrial dismissal, and this Court, having accepted *Hardwick,* can now correct the Eleventh Circuit's mistake regarding the authority of *Doe.*

Finally, a decision by the Court in the instant cause might be premature, since it could be instructive for the Court to wait to determine how other federal circuit courts decide the substantive issues involved in this case, as a number of sodomy statute challenges are presently working their way through the lower federal court system. In fact, it might be helpful to await a true conflict between the circuits on some of these cases in order to frame more clearly the issues and obtain a true adversarial case or controversy between the states' attorneys general in these other cases and the homosexual plaintiffs. A similar rationale was employed by this Court to dismiss certiorari in *New York v. Uplinger,* and the Court should consider this aspect carefully in acting upon the instant Petition.

For all of the above reasons, Baker's Petition for a Writ of Certiorari should be denied. Alternatively, this Court should grant Baker's Writ and summarily affirm the Fifth Circuit's holding in Hill's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been mailed, by Certified Mail, Return Receipt Requested, to all attorneys of record on this 26th day of March, 1986.

/s/ WM. CHARLES BUNDREN

Wm. Charles Bundren